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No. 94-270

In the Supreme Court of the United States

OCTOBER TERM 1994

UNITED STATES OF AMERICA,

Petitioner,

v.

ROBERT P. AGUILAR,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation with a membership of more than 8,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The American Bar Association recognizes the

NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers. Among the NACDL's stated objectives is the promotion of the proper administration of criminal justice. Thus, the members of the NACDL have a vital interest in insuring that the integrity of the federal and state systems of criminal justice are protected. This includes an interest in insuring that 18 U.S.C. §2232(c), which prohibits giving notice of an application or authorization for electronic surveillance with intent to "obstruct, impede, or prevent" such interception, or the attempt to provide such notice, is construed in a manner consistent with the protections afforded by the First Amendment to the United States Constitution.

STATEMENT

Amicus adopts respondent's statement of the case.

SUMMARY OF ARGUMENT

In contending that 18 U.S.C. §2232(c) applies to respondent's alleged conduct in this case, the government has advanced an interpretation of the statute that would infringe on speech protected by the First Amendment. If construed in the manner asserted by the government, §2232(c) would, therefore, be overbroad and unconstitutional. Since, as this Court has repeatedly instructed, statutes should be interpreted in a manner that preserves their constitutionality, the government's construction should be rejected. Accordingly,

the decision of the Ninth Circuit, which applied this guiding principle of statutory construction, should be affirmed.

The government's interpretation of §2232(c) presents intractable constitutional problems in three separate, but related, respects: (1) it would apply the statute not only to existing applications and/or authorizations for electronic surveillance, but in perpetuity even to those that had expired; (2) it would apply the statute to persons who obtained knowledge of the application or authorization lawfully, and who did not have a duty to maintain that information's confidentiality; and (3) it would apply the statute to applications for electronic surveillance that might be sought or authorized in the future.

As detailed below, if these three fatal flaws, independently or in combination, were incorporated into §2232(c), the statute would reach speech protected by the First Amendment. In order to sustain the prohibition, the government would have to cite an interest of the "highest order" that was at stake. The government has not proffered such an interest, and cannot. This Court has consistently held that criminal investigations and proceedings -- even secret grand jury proceedings -- do not constitute the requisite "higher" interest once they have expired.

Indeed, this Court has dismissed as "marginal" and "speculative" the possible future impact (on criminal investigations) of a witness's disclosure of his own testimony before a grand jury that has been discharged. In addition, this Court has also refused to uphold punishment for persons who are not bound by an obligation to keep information confidential, who obtain such information lawfully, and who then disclose such information.

In this case, the electronic surveillance disclosed by respondent had expired, and respondent did not obtain knowledge of the electronic surveillance unlawfully, or in the context of a duty to maintain confidentiality -- and, more importantly, the jury was not charged that such duty or unlawful appropriation were required under the statute. Application of the statute to these circumstances would threaten the First Amendment principles set forth repeatedly by this Court. As a result, in order to preserve §2232(c)'s constitutionality, the government's interpretation must be rejected, and the decision of the Ninth Circuit affirmed.

ARGUMENT

I. THE GOVERNMENT'S CONSTRUCTION OF §2232(c) REACHES CONSTITUTIONALLY PROTECTED SPEECH, AND THEREFORE IS OVERBROAD IN VIOLATION OF THE FIRST AMENDMENT

In its Brief submitted to this Court, the government states its interpretation of 18 U.S.C. §2232(c):

> [i]f, after acquiring knowledge of the application to intercept communications, defendant discloses the possibility of interception to others, he has violated the statute.

Petitioner's Brief at 16.[1]

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[1] Section 2232(c) reads as follows:

> Notice of certain electronic surveillance. -- Whoever, having knowledge that a Federal investigative or law enforcement has been authorized or has applied for authorization under chapter 119 to intercept a wire, oral, or electronic communication, in order to obstruct, impede, or prevent such interception, gives notice or attempts to give notice of the possible interception to any person shall be fined under this title or imprisoned not more than five years, or both.

That construction encompasses constitutionally protected speech in three particular areas, all of which are implicated in this case:

> (1) it continues the statute's proscription beyond the termination of the electronic surveillance;
>
> (2) it extends the statute's proscription beyond those instances in which the person disclosing had (a) obtained the information unlawfully; or (b) a duty to keep the disclosed information confidential; and
>
> (3) it extends the statute's proscription to potential future electronic surveillance.

Indeed, in its Brief below submitted to the Ninth Circuit, the government contended that liability under §2232(c) did not at all depend on either (a) the circumstances in which the information was obtained; or (b) whether the defendant was under any duty not to disclose. See Government's Brief on Appeal at 38. The government also claimed that whether the information disclosed was still protected was not the "determining factor" under §2232(c). See Government's Brief on Appeal at 40.

As discussed below, the government's position would make §2232(c) overbroad in violation of the First

Amendment. While First Amendment considerations may not be absolute, they can be overridden only by a government interest of the "highest order". Here, the government has not offered, and cannot offer, a countervailing interest equal in magnitude to that of the First Amendment values at stake.

Under the overbreadth doctrine as enunciated by this Court, a broad application of a statute that could cover protected speech violates the First Amendment. As this Court explained in *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972):

> [i]t matters not that the words appellee used might have been constitutionally prohibited under a narrow and precisely drawn statute. . . . the transcendent value to all society of constitutionally protected expression is deemed to justify allowing "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity," . . . This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.

Of course, an unconstitutionally broad application of a statute is neither mandatory nor even favored; rather, as this Court has instructed, "federal statutes are to be construed so as to avoid serious doubts as to their constitutionality, and [ ] when faced with such doubts the Court will first

determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid." *Communications Workers of America v. Beck*, 487 U.S. 735, 762 (1988) (citations omitted).

The Ninth Circuit recognized these principles below, and held that the construction urged by the government threatened to have a "substantial" impact on First Amendment interests. Pet. App. at 11a. As a result, the Ninth Circuit, consistent with approved practice, interpreted §2232(c) in a manner consistent with First Amendment principles.

A. *Section 2232(c) Does Not Extend Beyond the Termination of the Disclosed Electronic Surveillance*

In finding that the government's interpretation of §2232(c) was overbroad, the Ninth Circuit focused on the government's contention that the statute applied to respondent even though the electronic surveillance that had been disclosed had terminated well before that disclosure. Pet. App. at 11a-12a. The Ninth Circuit properly analyzed the government's attempted application of §2232(c), since to protect the secrecy of electronic surveillance in perpetuity would stifle constitutionally protected speech even after the government's asserted interest in confidentiality had expired. *Id.*

The Ninth Circuit used as an example the disclosure of "politically-motivated wiretaps", and that example, culled from experience and not from imagination, is illustrative. *Id.* A paradigm of the type of political repercussions that disclosure and subsequent public discussion of particular instances of electronic surveillance can be found in *Halperin v. Kissinger* 606 F.2d 1192 (D.C. Cir. 1979), *aff'd by an*

equally divided Court, 452 U.S. 713 (1981), which involved electronic surveillance of thirteen government employees, including members of the National Security Council staff, and four journalists. In fact, those wiretaps became one of the articles of impeachment against President Richard M. Nixon. *See Nixon v. Administrator of General Services*, 433 U.S. 425, 493 (1977).

Yet those important political revelations and ramifications, and public debate, might well be precluded under the version of §2232(c) urged by the government, since any journalist learning of an expired wiretap could *never*, under the government's interpretation, disclose that electronic surveillance. Nor could an academic *ever* make an historical study or analysis. Moreover, this type of speech -- "subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism" -- lies at or near the core of the First Amendment. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838-39 (1978), *quoting Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966). *See also Butterworth v. Smith*, 494 U.S. 624, 632 (1990); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979).[2]

In response, the government does not dispute that such persons could be prosecuted under its application of §2232(c). It merely argues that since an intent to "obstruct, impede, or prevent" a possible interception is required, such persons, and such speech, would not be the subject of prosecution. However, the reporter's or academic's intent

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[2] In *Landmark Communications, Inc.*, *supra*, this Court noted that "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." 435 U.S. at 838, *quoting Mills v. Alabama*, 384 U.S. 214, 218 (1966) (footnote omitted).

could very well be viewed as an attempt to "obstruct, impede, or prevent" in the context of alleging and/or exposing government overreaching and/or misconduct, including political or otherwise maliciously motivated investigations and prosecutions, and in seeking to curb such conduct. Yet that intent would place their conduct within the ambit of the government's version of §2232(c).

That danger is compounded by the government's refusal, detailed *post* at 17-19, to limit the electronic surveillance to that presently applied for, authorized, or existing. In applying §2232(c) to potential *future* electronic surveillance, the government creates the genuine threat that any article or treatise could be viewed as an intent to "impede" some future or incipient investigation contemplated after the expiration of the wiretap that is the subject of the disclosure.

Also, prescribing an infinite period of coverage under the statute would infringe on the First Amendment rights of other persons, including, in particular, attorneys. Even if, after the expiration of electronic surveillance, an attorney or other person learned (legally) of such surveillance, that attorney or other person could not, under §2232(c) as construed by the government, bring that surveillance to the attention of a news organization, a court, or a client without risking violation of the statute. Application of the government's standard would stifle public review of government and prosecutorial practices, and effectively insulate forever the policies and decision-making underlying particular instances of electronic surveillance, which constitutes perhaps the most sensitive law enforcement

technique, and the most serious threat to privacy.[3]

As noted *ante*, at 5-6, in order to impose restrictions on the exercise of First Amendment rights, the government must assert a compelling interest of the "highest order." *Smith v. Daily Mail Publishing Co.*, *supra*, 443 U.S. at 103. Moreover, the government assumes the burden of establishing the existence of that interest. *First National Bank v. Bellotti*, 435 U.S. 765, 786 (1978). As the Ninth Circuit found below, Pet. App. at 11a, and as this Court's prior decisions confirm, the interest asserted here by the government evaporates once the electronic surveillance has terminated.[4]

For example, in *Butterworth v. Smith*, *supra*, in which this Court invalidated a Florida law that prohibited a witness from ever disclosing his testimony before a grand jury, this Court held that the government's interest in maintaining the

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[3] Electronic surveillance and investigations that have concluded, and which have turned out to be unfounded, thereby not resulting in criminal charges, would not likely be the subject of public proceedings. Thus, while such instances might be the ripest area for abuse, they would remain unrevealed.

[4] The government cites *United States v. Russell*, 255 U.S. 138 (1921) (*see* Petitioner's Brief at 40) in support of its interpretation, but that case did not involve overbreadth analysis or claim any implications for protected speech, but instead focused on whether the indictment (which had been dismissed below) adequately had alleged an element of the offense charged (with this Court holding that it was sufficient in alleging that the defendant knew that a person was a petit juror summoned to appear for a criminal case, even though that person had not yet been selected or sworn). 255 U.S. at 141, 143-44.

secrecy of grand jury proceedings did not continue permanently, but ended with the discharge of the grand jury. 494 U.S. at 632. This Court also described the state's asserted interest in deterring potential future conduct -- possible subornation of perjury at trial -- as "marginal at best and insufficient to outweigh the First Amendment interest in speech involved." 494 U.S. at 633-34.

Moreover, this Court noted in *Butterworth* that the state's interest in preventing flight by targets between the time the grand jury ended and the target's arrest was only "a very speculative possibility" that was also insufficient. 494 U.S. at 632 n. 3. *See also Worrell Newspapers of Indiana, Inc. v. Westhafer*, 739 F.2d 1219, 1222 (7th Cir. 1984) (government's interest in "apprehension of criminals" insufficient to justify criminal sanctions against person who truthfully published the name of individual against whom sealed indictment had been returned), *aff'd*, 469 U.S. 1200 (1985).[5]

Here, as well, the government's asserted interest in the confidentiality of the electronic surveillance disappears once the surveillance has ceased. The possibilities of subsequent authorizations, or re-instituted investigations, are as speculative and marginal in this context as were the prospective interests the state asserted in *Butterworth*. Thus, the situation is perfectly analogous to that in *Butterworth*, in which the invalid state-mandated "ban extend[ed] not merely to the life of the grand jury, but into the indefinite future[,]"

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[5] Also, in *Landmark Communications, Inc.*, *supra*, this Court pointed out that with respect to out-of-court comments about pending cases or grand jury investigations, it had "consistently rejected the argument that such commentary constituted a clear and present danger to the administration of justice." 435 U.S. at 844.

494 U.S. at 636.

Consequently, the Ninth Circuit was correct in finding that the government's construction of §2232(c) -- which would apply the statute indefinitely even after the expiration of the electronic surveillance -- was overbroad, and in violation of the First Amendment.

B. *Section 2232(c) Does Not Extend to Disclosure of Information Obtained Legally, and For Which the Party Disclosing Was Not Under a Duty to Keep Confidential*

The government's construction of §2232(c) also extends the statute's coverage to a type of speech that this Court has heretofore not recognized as criminally punishable: the dissemination of truthful information lawfully obtained, without the disclosing party having any duty to maintain confidentiality.

The government's position is strident: even if a person obtains knowledge of the electronic surveillance lawfully, and even if that person is not under any obligation to keep that knowledge confidential, any disclosure by that person constitutes a violation of the statute. The government also contends that even if that person's knowledge of the electronic surveillance is augmented partially by *public* information, the statute still applies to any subsequent disclosure. Again, that interpretation infringes on established First Amendment freedoms, and must be rejected in order to preserve §2232(c)'s constitutionality.

Indeed, the possible adverse impact on the exercise of First Amendment rights is as dramatic in this respect as it is with respect to the government's assertion, discussed *ante*, that the statute applies indefinitely even after the electronic

surveillance terminates. For example, if a journalist were legally to learn of an electronic surveillance, *i.e.*, through a confidential source, *see Worrell Newspapers*, *supra*, 739 F.2d at 1220, or through legitimate investigative methods, *see*, *e.g.*, *Smith v. Daily Mail Publishing Co.*, *supra*, 443 U.S. at 99,[6] and even though that reporter did not have any duty to keep the information confidential, the publication or broadcast of that information would, under the government's construction, violate §2232(c). The same would be true for any other person -- academic, lawyer, or otherwise -- who, even absent any obligation to maintain secrecy or any illegal conduct in obtaining the information, disclosed such electronic surveillance.

Such an application would represent an unprecedented expansion of criminal liability for protected speech. In *Landmark Communications, Inc.*, *supra*, this Court held that the First Amendment did not permit

> the criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the Judicial Inquiry and Review Commission [of the State of Virginia].

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[6] In *Landmark Communications*, *supra*, the Court's opinion does not indicate the manner in which the news organization obtained information about a confidential judicial misconduct proceeding, except that the information was *not* obtained illegally. 435 U.S. at 837.

435 U.S. at 837.[7]

As a result, in *Smith v. Daily Publishing Co.*, *supra*, this Court noted that "state action to punish the publication of truthful information seldom can satisfy constitutional standards[,]" since " a penal sanction for publishing lawfully obtained, truthful information . . . requires the highest form of state interest to sustain its validity." 443 U.S. at 102-03.

In fact, this Court has not upheld criminal punishment for the disclosure of information lawfully obtained and revealed without any breach of duty, even though it has been asked to do so in *Landmark Communications, Inc.* and *Smith v. Daily Publishing Co.* *See also Worrell Newspapers*, *supra*, 739 F.2d at 1223 ("the [grand jury] secrecy provision in Rule 6(e) [Fed.R.Crim.P.] applies, by its terms, only to individuals who are privy to the information contained in a sealed document by virtue of their position in the criminal justice system").[8] Indeed, this Court has refused to permit

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[7] This Court reserved judgment on whether a prosecution could be sustained against "one who secures the information by illegal means and thereafter divulges it." 435 U.S. at 837.

[8] While the government argues that respondent here was burdened by a duty of confidentiality, in fact the District Court did not charge the jury that either unlawful acquisition or breach of duty of confidentiality were elements of the offense. Moreover, the government's position is clear that it believes that neither factor is relevant to liability under §2232(c). *See ante* at 5. Thus, the cases the government cites in its Brief, at 49 [*United States v. Jeter*, 775 F.2d 670 (6th Cir. 1985), *cert. denied*, 475 U.S. 1142 (1986), and *United States v. Howard*, 569 F.2d 1331 (5th Cir.), *cert. denied*, 439 U.S. 834 (1978)], are inapposite since they

recovery even in *civil* cases seeking damages for such disclosure. *See Cox Broadcasting v. Cohn*, 420 U.S. 469, 495 (1975).

Here, the government's interest is minimal, if it exists at all, since the electronic surveillance that respondent disclosed had expired almost a year earlier. *See Butterworth v. Smith*, *supra*, 443 U.S. at 1381-82 & n. 3 (once grand jury had been discharged, government's asserted interest in continued prohibition on witness's disclosure of his own testimony was at best "marginal" and "speculative"). Thus, the interest in continued secrecy with respect to electronic surveillance that had expired a year earlier cannot be sufficient to override the important First Amendment protection afforded the disclosure of information obtained lawfully and divulged in the absence of any breach of duty.

In addition, another element that compounds the overbreadth of the government's proposed construction of §2232(c) is the argument by the government, made at trial, that respondent's disclosure was precipitated not only by what he was told by Judge Peckham with respect to electronic surveillance, but also by respondent's observation of physical surveillance (a man across the street) outside his home, and that respondent's observation could be used to convict him under §2232(c). Jt. App. at 112-16. Indeed, the

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involved either persons with a duty to keep information confidential (in *Howard*, it was a court reporter who sold transcripts of grand jury proceedings), or persons who appropriated confidential materials in violation of grand jury secrecy as protected by Rule 6(e), Fed.R.Crim.P. (in *Jeter*, the defendant provided to the targets of an investigation carbon impressions of transcripts of grand jury proceedings after he had taken them from a court reporter).

jury's verdict supports the proposition that that piece of evidence was dispositive: respondent was acquitted of Count IV, which alleged disclosure *prior* to the observation on the street, but was convicted of Count VI, which alleged disclosure *after* the observation.

Thus, the government's theory, and, most likely, the jury's verdict of guilty, were premised on the consideration of what was, essentially, *public* information independently and lawfully gathered by respondent. In fact, the Ninth Circuit panel that initially heard respondent's appeal, and affirmed the conviction on Count VI, conceded that respondent's "knowledge" of the electronic surveillance ripened only after he "put two and two together" after witnessing the physical surveillance. Pet. App. at 43a.

If §2232(c) reaches persons who "put two and two together" based on their review or awareness of public documents and/or events, it would seriously impair First Amendment rights. Such an interpretation would expose to criminal prosecution those lawyers and journalists (and anyone else similarly situated) who, armed with certain information legally obtained, comb public records and information and then reach a conclusion about the existence of electronic surveillance.

For example, a lawyer or reporter might know of pre-existing but expired electronic surveillance through either a statutory interception notice received by a client, or via court proceedings or information received about them, and then, through identity of subject matter and/or overlap of participants, investigators, or prosecutors (or even rumors or reports in the media), surmise that another wiretap might exist, or have existed. The use of such information to make disclosure could, under the government's construction,

provide the basis for a prosecution under §2232(c).

That would be contrary to the explicit precedent established by this Court. As explained in *Smith v. Daily Mail Publishing Co.*, *supra*, this Court has held that "once the truthful information was 'publicly revealed' or 'in the public domain'[,]" its dissemination could not be restrained. 443 U.S. at 103. *See also Cox Broadcasting v. Cohn*, *supra*, 420 U.S. at 495 ("States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection").

Thus, disclosure based on publicly available information and publicly observed events cannot be punished under §2232(c) without infringing speech protected by the First Amendment. Moreover, this deficiency in the government's interpretation is again compounded here by the expiration of the electronic surveillance even prior to respondent's observation of the physical surveillance.

C. *Section 2232(c) Does Not Extend to Potential and/or Future Electronic Surveillance*

As a corollary to its claim that §2232(c) applies to electronic surveillance that has terminated, the government also apparently contends that the statute also protects against disclosure that might "obstruct, impede, or prevent" possible interceptions made pursuant to *potential* applications, authorizations, and electronic surveillance that might occur in the future.

While the Ninth Circuit decided below that, under §2232(c), the statutory phrase "such interception" (that the defendant must intend to "obstruct, impede, or prevent") refers to an interception pursuant to the *specific* electronic

surveillance that is disclosed (*see* Pet. App. at 8a-9a), that government argues instead that "the government need *not* prove that the actual wiretap was in operation or that the authorization for a wiretap was pending at the time the disclosure was made." Petitioner's Brief at 46 (emphasis in original). *See also* Petitioner's Brief at 39 ("[a] defendant can intend to obstruct a wiretap that is not in operation, or even a wiretap that was never authorized"). The government's subsequent references to the potential for "successive" wiretap applications, and "reauthorizations" (as opposed to extensions) make it clear that the government's position would apply §2232(c) to the impact disclosures of prior, expired electronic surveillance might have on future applications and authorizations. *See* Petitioner's Brief at 42-44 & n. 11.

As discussed *ante* at 10-12, any interest the government might assert with respect to future electronic surveillance would not suffice to overcome the important First Amendment principles at stake. *See Butterworth v. Smith*, *supra*; *Worrell Newspapers*, *supra*. Under the government's construction, even persons who receive statutory notices of interception could not disclose the electronic surveillance (even to their lawyers) for fear that it might be deemed an attempt to "obstruct, impede, or prevent" some future interception the government might seek subsequent to the expiration of the disclosed electronic surveillance.

Indeed, the government's inflexible resistance to *any* time limitation on the ambit of §2232(c), and/or to any limitation to particular applications and authorizations (and possible interceptions thereunder), completely undermines its insistence that the overbreadth of its interpretation is cured by the requirement that the defendant's intent be to "obstruct,

impede, or prevent" an interception.

As noted *ante* at 7-9, if §2232(c) applies to all possible electronic surveillance in perpetuity, and someone, such as a journalist, or lawyer, or academic, discloses prior electronic surveillance with the intent of curtailing future abuse of electronic surveillance, then the intent element will have been satisfied, since the intent clearly would be to "impede" future interceptions of the same ilk.

The practical effect of the government's construction of §2232(c) would be to deprive the public permanently of information about particular instances of electronic surveillance. That is speech at the very "core" of the First Amendment, and the Ninth Circuit was correct in determining that the government's interpretation would infringe on constitutionally protected speech, and was therefore overbroad. Accordingly, it is respectfully submitted that the decision of the Ninth Circuit -- that §2232(c) be construed in a fashion that preserves its constitutionality, and which compels reversal of respondent's conviction under §2232(c) -- should be affirmed.

CONCLUSION

Because under the government's construction of §2232(c) the statute would reach constitutionally protected speech and therefore be overbroad in violation of the First Amendment, it is respectfully submitted, for all the reasons set forth above, as well for those set forth in Respondent's Brief, that the decision of the United States Court of Appeals for the Ninth Circuit be affirmed.

Dated: 13 February 1995
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